COLORADO ENVIRONMENTAL COALITION ET AL.

IBLA 89-56 Decided March 20, 1989

Appeal from a decision of the State Director, Colorado, Bureau of Land Management, affirming decision of the Area Manager, San Juan Resource Area, Colorado, Bureau of Land Management, approving application for permit to drill. C-12052.

Motion to dismiss denied; request for stay denied; BLM decision reversed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Dismissal

   The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Oil and Gas Leases: Drilling

   A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

APPEARANCES: William J. Lockhart, Esq., Salt Lake City, Utah, for appellants; Dante L. Zarlengo, Esq., Denver, Colorado, for BWAB Inc.; Gina Guy, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

On October 21, 1988, the Colorado Environmental Coalition, along with several other interested organizations and individuals (hereinafter referred to as appellants), 1/ filed a notice of appeal from a decision of the State Director, Colorado, Bureau of Land Management (BLM), dated September 21, 1988, affirming a September 12, 1988, Record of Decision (ROD) of the Area Manager, San Juan Resource Area, Colorado, BLM, approving an application for a permit to drill (APD) a well near the Hovenweep National Monument filed
by BWAB Incorporated (BWAB). In conjunction with their appeal, appellants request an immediate stay of any further actions pursuant to the approved APD, pending the Board's resolution of the merits of their appeal.

The record indicates that, on July 18, 1988, BWAB, designated
operator under oil and gas lease C-12052, filed an APD for the proposed Federal No. 10-32 well. The well was to be situated in the SW^NE^ sec. 10, T. 36 N., R. 20 W., New Mexico Principal Meridian, Montezuma County, Colorado, approximately one-half mile south of the Holly unit of the Hovenweep National Monument, which is administered by the National Park Service (NPS). The monument does not cover one integral segment of public land, but rather is broken down into six physically discrete units in southwestern Colorado and southeastern Utah. Each unit contains the ruins of ancient Indian masonry structures. Land adjacent to the Holly and Hackberry units of the monument are encompassed by oil and gas lease C-12052, originally issued effective January 1, 1971, and currently held by Mobil Oil Corporation.

The APD divides anticipated activities under the approved permit into those to be conducted during exploration and production phases of approved operations. Initially, the APD provides for minimal improvement of 2.5 miles of an existing access road across public land running south from a county road between the Holly and Hackberry units of the Hovenweep National Monument to the well site, construction of a well pad and reserve pit, location of associated facilities, and drilling and completion of the well. 2/ Following completion of the well, the APD further provides for reclamation of any disturbed areas, including the reserve pit, not needed for production. Finally, the APD provides for upgrading of any finally selected access road, location of production facilities, and production of the well.

1/ The appeal was also filed on behalf of the National Parks and Conservation Association, the Wilderness Society, and the Weminuche Chapter of the Sierra Club, as well as several individuals, viz., Jeremiah St. Ours, Ray A. Williamson and Anne Englert.

2/ The APD described improvement of the access road as involving "some minor grader work at two points, filling of some washouts with gravel and watering for maintaining of the road bed and dust control."

Upon receipt, BLM posted the APD for a 30-day comment period. Comments were received from most of the appellants. In addition, BLM conducted several meetings and on-site inspections of the proposed well site with representatives of NPS and Kenneth King. King, an employee of the Geological Survey, was contacted regarding the potential effect of vibrations caused by drilling and road improvement activities on the Indian ruins in the monument because he had previously performed research related to this issue. Also, the record indicates that a class III cultural resource inventory of the area of proposed disturbances was conducted, which inventory identified and evaluated specific cultural resource sites. Finally, BLM consulted the Colorado State Historic Preservation Officer.

Thereafter, in order to assess the environmental impact of approving the APD, BLM prepared an environmental assessment (EA) (CO-030-SJ-88-234). The EA expressly states that it is concerned only with the drilling phase of proposed operations and that, if the well produces, an "additional environmental review will be done to assess the impacts of permanent access and production facilities" (EA at 1). Specifically, the EA assessed the environmental impact of improvement of the existing access road and drilling and completion of the well as proposed by BWAB with the incorporation of various mitigation measures developed during the course of the initial review process, an alternative access route, an alternative well site, and a no action alternative.

Based upon the analysis contained in the EA, the Area Manager approved the APD in her September 1988 Record of Decision (ROD), thereby approving improvement of the existing access road and drilling and completion of the well as proposed by BWAB, with incorporation of all of the mitigation measures set forth in the EA. 3/ The ROD was expressly limited to approval of drilling, testing, and abandonment of the well and improvement and use of the existing access road in connection therewith, and stated that production activities, specifically those involving access and location of production facilities, would be subjected to additional environmental review and a decision where "drilling indicates the presence of hydrocarbons and production is warranted" (ROD at 1).

The Area Manager explained in the ROD that BLM had decided to bifurcate approval of the APD in order to avoid the unnecessary expenditure of time and resources where there was a fair probability that the well would be determined to "be a dry hole and [would] be abandoned by BWAB." Id. She also stated that rejection of the APD was not considered a "legal option" consistent with the lessee's rights under the applicable lease. Finally, the Area Manager concluded that approval of the APD did not constitute a major Federal action which would significantly affect the quality of the

3/ Stipulations attached to the APD provide for improvement of the existing access road "limited to [that] needed to allow passage of equipment and prevent resource damage." In addition, the stipulations provide for routing the road around an identified cultural resource site and improvement of one section of the road bed so as to minimize vibrations caused by vehicles near an Indian ruin within the monument.

human environment, thereby necessitating preparation of an environmental impact statement (EIS) in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. | 4332(2)(C) (1982). In conjunction with issuance of the ROD, the Area Manager executed the APD, with attached stipulations, thereby approving the APD for a period "not to exceed [one] year."

On September 15, 1988, appellants filed a protest of the Area Manager's September 1988 ROD with the Colorado State Office, objecting to approval of the APD. Appellants essentially challenged the adequacy of the EA and asserted that an EIS was required given "substantial questions regarding potential impacts" to the Indian ruins from nearby drilling, blasting, and vehicular use. Appellants subsequently filed what was styled a notice of appeal to the Board with the State Office on September 19, 1988. Both the protest and the notice of appeal were treated by the State Director as requests for administrative review pursuant to 43 CFR 3165.3(b) and consolidated for decision by him.

In his September 1988 decision, the State Director affirmed the Area Manager's September 1988 ROD after reviewing all of appellants' objections to approval of the APD. 4/ Almost immediately after issuance of the State Director's September 1988 decision, work began on construction of the well pad and improvement of the access road. That work was completed on September 24, 1988, and the drilling rig was moved onto the well site on October 18, 1988. In addition, blasting was determined to be necessary for construction of the reserve pit and was conducted without incident on September 27, 1988, subject to monitoring by King as stipulated in the APD. The well was spudded on October 20, 1988. As noted supra, appellants filed their appeal of the State Director's September 1988 decision on October 21, 1988, requesting an immediate stay of further operations.

In their statement of reason for appeal (SOR), appellants principally object to BLM's approval of the subject APD on the basis that BLM failed to adequately assess the potential cumulative impact of the proposed drilling in conjunction with other approved and anticipated drilling and production within what was designated by BLM and NPS in a document entitled "Cooperative Management Strategies" (CMS), dated April 1, 1987, as the "Resource Protection Zone" surrounding the Square Tower, Holly, and Hackberry units of the Hovenweep National Monument. 5/ Appellants note that BWAB has one producing well within that area and has filed APD's for two additional wells, all to the west of the Holly unit of the monument.

4/ The State Director also responded to appellants' request for a stay of the Area Manager's September 1988 ROD, concluding that, while a request for administrative review did not automatically operate as a stay, the Area Manager had been instructed "to stay any operations under the APD, pending the completion of this review."

5/ The importance of this zone is explained in a December 1987 Draft General Management Plan and Development Concept Plan prepared by NPS (Appendix C attached to appellants' SOR), at page 4:

Appellants contend that approved and anticipated drilling and production activities, "cumulatively as well as individually, are likely to have significant adverse effects on the interrelated archeological resources and historic scene" of the monument and surrounding resource protection zone and that failure to consider that potential cumulative impact constitutes not only a crucial deficiency in the EA but is violative of the comprehensive protection management scheme envisioned in the CMS (SOR at 2). Specifically, appellants are concerned that such activity will adversely affect the "currently unknown interrelationship" among cultural resources within the monument and the protection zone and the historic scene as perceived and enjoyed by visitors to the monument. Id. at 3.

In addition, appellants contend that the EA was deficient in the consideration of alternatives and that approval of the APD either violates or disregards specific directives in the CMS without any supporting environmental analysis. Overall, appellants assert that an EIS is required in order to fully assess the cumulative impact of drilling and production activities generally in the protection zone and that approval of the current APD should have been deferred pending preparation of the EIS and a Joint Management Plan and Cooperative Agreement which was intended, as an outgrowth of the CMS, to provide a detailed management program for the protection zone, where approval of the APD "may interfere with or limit the range of effective management options." Id. at 5.

Therefore, appellants request the Board to set aside the State Director's September 1988 decision and remand the case to BLM for preparation of an appropriate EIS prior to authorizing any further activities under the APD. Pending the Board's review of the merits of this controversy, appellants request an immediate stay of any further activities under the APD, with the exception of those necessary for protection of the affected lands and natural resources.

On November 7, 1988, BWAB filed a motion to intervene in the present proceedings, asserting its objection to the granting of appellants' request for a stay. BWAB also requested expedited consideration of the instant appeal. However, on November 25, 1988, BWAB filed a withdrawal of all of its filings, stating that "the [Federal No.] 10-32 well has reached its objective depth and [been] found to be non-productive." Accordingly, no action will be taken on BWAB's motion to intervene and request for expedited consideration.

fn. 5 (continued)

"It is important to understand and safeguard the previous aspects of a particular culture in order to understand the climax phenomenon. In other words, the reason behind the construction of the Hovenweep tower complexes may not lie within these ruins, but in the previous settlement areas that were generally abandoned and that currently surround the national monument. Mesa tops away from the canyonheads also contain areas of agricultural activity that may have supported the canyonhead communities."

Thereafter, on November 28, 1988, BLM filed a motion to dismiss the instant appeal, asserting that it had been rendered moot in view of the fact that the Federal No. 10-32 well had been drilled, plugged, and abandoned in the absence of production. BLM stated that "all action authorized by BLM pursuant to the permit to drill has occurred." BLM further explained that the applicable bond would subsequently be released after the completion of reclamation and a determination that the well had been properly plugged and abandoned, but that, in any case, "[n]o other action can occur pursuant to this permit to drill."

Attached to BLM's motion to dismiss is a November 17, 1988, affidavit of the Area Manager in which she states that the well was determined to be nonproducing on November 4, 1988, and, on the following day, was plugged and abandoned. This is supported by a sundry notice of abandonment which was submitted by BWAB and approved, subject to certain conditions regarding reclamation, by the Acting Area Manager on November 10, 1988. A copy of that notice has been provided to the Board.

Appellants have filed no response to BLM's motion to dismiss. However, in their SOR, at page 19, they oppose dismissal of their appeal on the basis of mootness, asserting that the issues they raise "concern the continuing and future effects of oil and gas development within the 'resource protection zone,'" and transcend the approval of the subject APD.

[1] It is well established that the Board will dismiss an appeal as moot where, subsequent to the filing of the appeal, circumstances have deprived the Board of any ability to provide effective relief and no concrete purpose would be served by resolution of the issues presented. Jack J. Grynberg, 88 IBLA 330 (1985); Douglas McFarland, 65 IBLA 380 (1982); John T. Murtha, 19 IBLA 97 (1975). Relying on this standard, however, we have declined to dismiss an appeal on the basis of mootness where, as in the judicial context, it presents an issue which is "capable of repetition, yet evading review" (Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911)), especially in circumstances where the BLM decision is placed by Departmental regulation into full force and effect pending resolution of the appeal, and action is taken pursuant thereto before the Board can act on a request for a stay or otherwise reach the merits of the case. Yuma Audubon Society, 91 IBLA 309, 312 (1986), and cases cited therein.

We have held that to dismiss an appeal presenting potentially recurring issues on the basis of mootness initially deprives the appellant of the objective administrative review to which it is entitled and may ultimately preclude any administrative review in such circumstances. Rather, the better approach is to address the issues presented, thereby affording suitable administrative review and providing the necessary direction to BLM in such likely future cases. That is the situation here.

In the present case, the drilling and subsequent plugging and abandoning of the Federal No. 10-32 well, where all that remains is the rehabilitation of the drill site and associated areas, has clearly deprived the Board of its ability to provide any effective relief, even assuming the Board were

to find that BLM's approval of the subject APD was fatally flawed. Nevertheless, we conclude that the appeal presents a significant issue concerning the adequacy of BLM's assessment of the potential effect of drilling and associated road improvement activity on the Hovenweep National Monument and surrounding resource protection zone, which issue is likely to recur.

This issue is very likely to arise again in view of BWAB's demonstrated interest in determining and developing the oil and gas potential underlying land within the resource protection zone in fairly close proximity to the Holly and Hackberry units of the Hovenweep National Monument. This is evident from the fact that, at the time of the State Director's September 1988 decision, BWAB had drilled one well and filed APD's with respect to two other wells in that area.

Moreover, in view of the fact that 43 CFR 3165.4(c) places a decision approving an APD into full force and effect pending resolution of an appeal and thus permits the operator to drill and complete the well before the Board can act on a request for a stay or otherwise reach the merits of the case, there is a distinct possibility that the issue of the adequacy of BLM's assessment of the potential effect of drilling and associated road improvement activity on the Hovenweep National Monument and surrounding resource protection zone will evade any effective review by the Board. This is clearly a case where the issue presented is "capable of repetition, yet evading review." Therefore, we deny BLM's motion to dismiss appellants' appeal as moot.

While we decline to grant BLM's motion to dismiss appellants' appeal as moot, it is clear that the Board need no longer address appellants' request for a stay in view of the drilling and subsequent plugging and abandoning of the Federal No. 10-32 well. There is simply no relevant activity under the approved APD which could be stayed where all that remains is reclamation. Accordingly, we deny appellants' request for a stay.

All that remains is for the Board to consider the merits of appellants' appeal. We will afford that appeal expedited consideration because resolution of the issues raised will significantly affect the future impending course of oil and gas exploration and development in the area of the Hovenweep National Monument. We, therefore, turn to the merits of this case.

[2] Appellants' principal assertion is that the proposed drilling in conjunction with other approved and anticipated drilling and production within the designated resource protection zone surrounding certain units of the Hovenweep National Monument may have a cumulative impact on cultural and visual resources in that area, which resources are sought to be protected by that designation, and that BLM failed to consider this impact. At the outset, we recognize that BLM is required, in connection with approval of a specific activity, to assess any cumulative impacts where that activity in association with other past, present, and reasonably foreseeable actions on the public lands may cause such impacts. See Park County Resource Council, Inc. v. U.S. Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987); Glacier-Two Medicine Alliance, 88 IBLA 133, 145 (1985); John A. Nejedly, 80 IBLA 14, 18 (1984).

There is no question that, in conjunction with its assessment of the environmental impact of approval of the subject APD, BLM failed to consider any potential cumulative impacts associated with drilling and road improvement activity in connection with the Federal No. 10-32 well and related activity in the resource protection zone. BLM explained in its EA, at page 7, that: "Since this action is an initial well in an as yet untested geologic formation, no cumulative impacts are expected. If the well is found to be a producer, and additional wells are proposed, a cumulative impact assessment will be necessary at that time."

The record indicates that BLM generally regarded a cumulative impact assessment as necessary only in the event of proposed development by a number of producing wells of a distinct field within the resource protection zone, which assessment would be limited to the area encompassed by the reservoir boundaries. 6/ In this light, BLM apparently did not regard such an assessment as necessary in the case of the Federal No. 10-32 well, even though a producing well was already situated within the protection zone to the west of the Holly unit of the Hovenweep National Monument, where the proposed well was to be drilled into a geologic formation functionally discrete from formations already tested in that other area. See EA at 1. In these circumstances, BLM apparently concluded that there was at that time no proposed development of a distinct field within the protection zone involving the subject well and, thus, no cumulative impact assessment was necessary.

We are not persuaded by BLM's reasoning for failing to consider any potential cumulative impacts which might result from drilling and road improvement activity in accordance with the subject APD and related activity. It is clear that BLM does not recognize potential cumulative impacts except where there has been a determination of the presence of such an oil and gas reservoir as would justify field development and such development has been proposed. In this sense, BLM regards cumulative impacts as associated only with field development. That is not necessarily the case. In fact, cumulative impacts may conceivably result from exploratory drilling of a particular well and associated activity in conjunction with exploratory drilling or production of another well and associated activity in the same general area prior to any proposed development of a field. BLM cannot simply rule out this possibility without any analysis. Nor can BLM justifiably delay consideration of such potential cumulative impacts until field development is proposed.

6/ The Associate State Director, Colorado, BLM, explained in a Sept. 21, 1988, memorandum to the Director, BLM, that: "We have reached agreement with the State Director, Utah, to consider cumulative impacts of field development, if drilling eventually confirms a field, through an environmental analysis of oil and gas production within the boundaries of the producing reservoir." The agreement, attached to the September 1988 memorandum, further stated that "consideration of cumulative impacts would not be triggered by production of the first well, but by the consideration of a second APD following the first producing well within the same reservoir boundary."

Moreover, BLM fails to recognize that cumulative impacts are not simply a function of the development of a particular field. Drilling and associated road improvement activity have an undeniable impact on surface resources. Furthermore, where a number of wells are to be drilled in reasonably close proximity, such activity together may cumulatively affect surface resources, not necessarily confined within the limits of a productive field. That cannot be discounted in the absence of a proper assessment by BLM.

In the present case, it was clear, at the time of consideration of the subject APD, that the proposed drilling and other approved and anticipated drilling and production of wells, together with associated road improvement activity, in the vicinity of the Hovenweep National Monument might cumulatively affect the protected Indian ruins and potential cultural resources in the surrounding lands within the resource protection zone by subjecting them to increased vandalism as a result of improved access and generally affect a visitor's enjoyment of the historic scene by increasing the noise and contemporary structures visible from the ruins and the protection zone. However, BLM has not considered any such potential cumulative impacts. Such potential impacts have particular significance where the area encompassing all of such activity is designated a resource protection zone, which zone is intended to be protected as a whole given what appellants term "common resource values" (SOR at 4).

We are not holding that consideration of these potential cumulative impacts would necessarily have caused BLM to have foregone approval of the APD. Indeed, the dictates of NEPA are primarily procedural. Nevertheless, where the purpose of the statute is to "insure a fully informed and well-considered decision," (Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978)), it is incumbent upon BLM to "assiduously fulfill the obligations imposed by NEPA" (State of Wyoming Game & Fish Commission, 91 IBLA 364, 367 (1986)).

Nor are we holding that BLM was required to consider the full impact of field development where the actual scope of such development was generally speculative at best at the time of consideration of the subject APD. See The Sierra Club, 104 IBLA 76, 86-87 (1988). Rather, BLM was required to consider potential cumulative impacts associated with existing and proposed drilling and production activity, together with associated road improvement activity, generally within the resource protection zone, which impacts could actually be envisioned at the time of consideration of the APD. Where there were undeniably such potential impacts, BLM was obligated under NEPA to consider them. See Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985).

Because of BLM's failure to assess any potential cumulative impacts resulting from approval of the APD in conjunction with other approved and anticipated drilling and production of wells and associated road improvement activity in the resource protection zone, the Area Manager's September 1988 ROD approving the APD cannot be regarded as founded on a proper basis. In these circumstances, we must reverse the State Director's September 1988 decision affirming that ROD.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss appellants' appeal as moot is denied, appellants' request for a stay of further activities under the approved APD is denied, and the State Director's September 1988 decision affirming the Area Manager's September 1988 ROD approving the subject APD is reversed.

John H. Kelly
Administrative Judge

I concur:

James L. Burski
Administrative Judge